

STATE OF TENNESSEE

Office of the Attorney General



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Reply to:
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December 27, 2002

Chairman Sara Kyle
Tennessee Regulatory Authority
460 James Robertson Parkway
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**RE: In Re: Small Telephone Companies Tariff Filings Regarding Reclassification
of Pay Telephone Service as Required by Federal Communications
Commission, FCC Docket 96-128
Docket No. ~~01-001181~~ 97-01181**

Dear Chairman Kyle:

Enclosed is an original and thirteen copies of the Office of the Attorney General's Brief in Support of Application of 47 U.S.C. §276 to All Telephone Companies Including Small Telephone Companies for filing in the above-referenced matter. If you have any questions, kindly contact me at (615) 741-3533. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy C. Phillips".

Timothy C. Phillips
Assistant Attorney General

TCP:sc
Enclosures

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**BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

IN RE: SMALL TELEPHONE
COMPANIES TARIFF FILINGS
REGARDING RECLASSIFICATION
OF PAY TELEPHONE SERVICE AS
REQUIRED BY FEDERAL
COMMUNICATIONS COMMISSION
FCC Docket 96-128

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Docket 97-001181

**OFFICE OF THE ATTORNEY GENERAL'S BRIEF IN SUPPORT OF APPLICATION
OF 47 U.S.C. §276 TO ALL TELEPHONE COMPANIES INCLUDING SMALL
TELEPHONE COMPANIES**

The Attorney General's Office, through the Consumer Advocate and Protection Division ("Attorney General"), participates as an intervener in this matter before the Tennessee Regulatory Authority ("TRA").

The Attorney General submits this brief in response to the Report and Recommendation issued by the Pre-Hearing Officer on December 6, 2002. The Pre-Hearing Officer stated therein that the parties were to file briefs addressing whether 47 U.S.C. §276, as interpreted by the Federal Communications Commission ("FCC"), is applicable to the small telephone companies.

ISSUE PRESENTED FOR REVIEW

Whether 47 U.s.c. § 276, as interpreted by The Federal Communications Commission, is applicable to the small telephone companies

STATEMENT OF FACTS

Section 276 of the Federal Telecommunications Act of 1996 (the "Act") mandated the Federal Communications Commission to promulgate rules to require all telephone companies to

file tariffs in order to reclassify payphones and remove subsidies to payphone operations from other classes of services.¹ The FCC rules stated that state regulatory agencies were to execute the rules in order to meet the objectives of Section 276. Thereafter, the FCC issued several orders providing further clarification in connection with Section 276 of the Act. The orders that the FCC issued provided further explanation and instructions concerning Section 276.

In accordance with the FCC rules, payphone operators in Tennessee were required to file tariffs with the TRA. BellSouth and United Telephone Southeast, Inc. filed their tariffs with the TRA followed by the other telephone companies. Following filing of the tariffs, AT&T Communications of the South Central States ("AT&T"), Tennessee Payphone Owners Association ("TPOA"), MCI Telecommunications Corporation ("MCI") and the Attorney General filed respective petitions to intervene. At that point, the TRA began a contested case concerning the tariffs. The TRA also consolidated the dockets in order to proceed with a contested case and docket number 97-00409 was assigned.

At the May 29, 1997 pre-hearing conference, the Attorney General requested that the TRA bifurcate Docket No. 97-00409 to have one proceeding including BellSouth, UTSE and Citizens and another proceeding for the small companies. It was evident that the expense of preparing cost studies in the matter would be exorbitant for the small telephone companies. The pre-hearing officer agreed with the Attorney General and granted the bifurcation of the proceeding so that the small telephone companies were spared the expense associated with filing

¹ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541 (Sept. 20, 1996) ("Report and Order").

cost studies. This present proceeding concerns the docket related to the small telephone companies.

ARGUMENT

A. The TRA Has the Authority in This Docket to Require the Small Telephone Companies to File Tariffs in Accordance with Section 276 and the FCC Rules

Tennessee Code Annotated § 65-4-201 states that the TRA has the “general supervisory and regulatory power, jurisdiction and control over all public utilities and also over their property, property rights, facilities, and franchises . . .” Tennessee law grants the TRA broad general supervisory and regulatory authority over all telecommunication service providers and the TRA has the authority to require that small telephone companies comply with Section 276 and the FCC rules concerning payphones and the TRA has the authority to determine the rates of payphones of all telephone carriers in the State of Tennessee.²

Section 276 of Telecommunications Act of 1996 grants the FCC authority to effectuate the goals in “promoting competition among payphone service providers and promoting the widespread deployment of payphone services to the benefit of the general public . . .”³ To that end, the FCC has taken the necessary steps to facilitate increased competition and they have issued rules and regulations that provide incentives to all participants in the industry to eliminate the factors that prevent a competitive payphone industry. Additionally, they have instructed the states to assist in implementing the FCC rules.⁴ The rules state that enforcement of Section 276

² Tennessee Code Annotated § 65-5-204 grants the TRA power “to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules . . .” for all telephone companies.

³ 47 U.S.C. § 276(b)(1)

⁴ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11

is given to the state regulatory agencies and the telephone companies are required to file tariffs with the state commissions reclassifying payphones and removing subsidies associated with payphone services.⁵

B. The FCC Specifically Stated in Their Orders That Section 276 Was Applicable to All Telephone Companies Including Small Telephone Companies

The small telephone companies are subject to the rules and orders issued by the FCC. Section 276 explicitly grants the FCC the authority to establish rules concerning payphones and the rules enacted by the FCC are consistent with the mandate granted in Section 276. Nevertheless, in an effort to provide further clarification, the FCC issued a Report and Order⁶ dated September 20, 1996 setting forth the guidelines and providing additional explanation of Section 276. Some of the requirements set forth in the FCC's Report and Order requires that all Local Exchange Carriers' ("LECs") payphone tariffs must be cost-based and nondiscriminatory.⁷ The FCC was also required to adopt safeguards that would prevent Bell operating company ("BOC") from subsidizing and discriminating in favor of their own payphone services.⁸

It is undisputed that the small companies are LECs. Therefore, they are subject to the provisions in Section 276.⁹ When the FCC issued their Notice of Proposed Rulemaking, they

FCC Rcd 20,541, ¶8 (Sept. 20, 1996) ("Report and Order").

⁵ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541, ¶60 (Sept. 20, 1996) ("Report and Order").

⁶ Order on Reconsideration, 11 FCC Rcd 21233, 21308 (1996).

⁷ Second Report and Order, 13 FCC Rcd 1778 (1997), ¶ 2, citing Order on Reconsideration, 11 FCC Rcd 21233, 21308 (1996).

⁸ 47 U.S.C. §§ 276(a), 276(b)(1)(C).

⁹ <http://www.state.tn.us/tra/telecomfiles/ilecs.pdf>

specifically stated that the rules were to be applied to all telephone companies. The FCC stated in their Notice of Proposed Rulemaking that the rules applied to “each and every completed intrastate and interstate call using [a] payphone.”¹⁰ The FCC was clear that the rules applied to all payphones, and did not include any exceptions for the types of entity or the size of the entity operating the payphone. This means that all calls regardless of whether the carrier is a independent carrier, small carrier or a BOC is subject to complying with Section 276 and the FCC rules.

There are numerous references in the FCC’s Report and Order stating that Section 276 applies to small telephone companies. One such example is in paragraph 8 of the Report and Order wherein the FCC clearly states that they are to achieve the goals of Section 276 by implementing rules and regulations that provide incentives “to all the players in the industry” to allow for a competitive payphone industry.¹¹ The intent of Congress to promote an open and competitive market in the industry, as expressed in the Telecommunications Act of 1996 was the goal and mandate of the FCC. In placing uniform rules and regulations on the industry as whole, without exemptions, the FCC was promoting an equal playing field in the market for all carriers. Another example of language in the FCC’s Report and Order applying the Section 276 to all telephone companies states that the objective of the section is “to establish regulatory parity for

¹⁰ See 47 U.S.C. § 276(b)(1)(A); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Notice of Proposed Rulemaking, 11 FCCRcd 6716 (1996) (“Notice”).

¹¹ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541, & 8 (Sept. 20, 1996) (“Report and Order”).

all [payphone service providers] PEPS, whether independent payphone providers, or incumbent LECs (both independents [sic] LECs and BOCs)."¹² *Emphasis added*

Additionally, the Report and Order¹³ states that Congress directed the FCC to promulgate rules "ensuring fair compensation for all calls from payphones."¹⁴ There is no exception or distinction concerning the type of carrier or telephone company that operates a payphone with respect to the subsidy at issue in this docket.¹⁵ The FCC has applied Section 276 to all carriers, regardless of size, in order to meet the stated goals and desired objectives of Congress. Finally, no exemptions are found in the statute, in the FCC rules or the FCC orders that support any type of alternate plan for smaller carriers. Most importantly, Section 276 of the Act does not mention a distinction between a large and small carrier and applies the law to all providers of payphone services.

Also, the TRA has not allowed for exemptions to the small telephone companies. The TRA's hearing officer issued a Preliminary Report and Recommendation in Docket Number 97-00409 on May 29, 1997 that stated that Section 276 applied to all telephone carriers. Chairman Greer, acting as the hearing officer, issued the report and did not provide for any exceptions to

¹² See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541, ¶10 (Sept. 20, 1996) ("Report and Order").

¹³ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541 (Sept. 20, 1996) ("Report and Order").

¹⁴ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541, ¶3 (Sept. 20, 1996) ("Report and Order").

¹⁵ 47 U.S.C. § 276(b)(1)(B).

the small telephone companies.¹⁶

Additionally, the FCC even rejected arguments that Section 276 applied only to payphones provided by the BOCs.¹⁷ In the Report and Order issued by the FCC dated September 20, 1996, they state:

While Section 276(a), which the states cite as support for their argument, applies only to the BOCs, as do Sections 276(b)(1)(C) and Section 276(b)(1)(D), the remainder of Section 276 applies to all payphones, regardless of their provider.¹⁸ When Congress intended to limit the scope of a particular provision in Section 276 to the BOCs, it used the term 'Bell operating company.'¹⁹ Otherwise, it used the term 'all payphone service providers[.]'²⁰ or simply 'payphone service providers.'²¹ For example, Section 276(b)(1)(C) states that the per-call compensation plan must 'ensure that all payphone service providers are fairly compensated[.]'²² **Therefore, based on the plain language of the statute, we conclude that Section 276 grants us the requisite authority to adopt rules that apply to all payphones, regardless of their provider, except where the language clearly applies only to the BOCs.**²³ Further, the legislative history of Section 276

¹⁶ See *Preliminary Report and Recommendation of the Hearing Officer*, All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by the Federal Communications Commission Docket 96-126, Docket 97-00409, May 29, 1997.

¹⁷ See *Report and Order*, 11 FCC Rcd 20,541 (1996), ¶76.

¹⁸ See *Report and Order*, 11 FCC Rcd 20,541 (1996), ¶76.

¹⁹ See *Report and Order*, 11 FCC Rcd 20,541 (1996), ¶76 citing 47 U.S.C. § 276(a), 276(b)(1)(C), 276(b)(1)(D).

²⁰ See *Report and Order*, 11 FCC Rcd 20,541 (1996), ¶76 citing 47 U.S.C. § 276(b)(1)(a), 276(b)(1)(E).

²¹ See *Report and Order*, 11 FCC Rcd 20,541 (1996), ¶76 citing 47 U.S.C. § 276(b)(1), 276(b)(3).

²² See *Report and Order*, 11 FCC Rcd 20,541 (1996), ¶76 citing 47 U.S.C. § 276(b)(1) (a). (Emphasis added).

²³ See *Report and Order*, 11 FCC Rcd 20,541 (1996), ¶76 citing 47 U.S.C. § 276(b)(1).

refers to both the BOCs and independent payphone service providers.²⁴ (Emphasis added).

It should be mentioned that the FCC was cognizant that problems could arise for the smaller entities and the small incumbent LECs could face problems in complying with the requirements of Section 276 and the rules set forth by the FCC. Nevertheless, the FCC was still specific about applying Section 276 to all payphones and they even rejected proposals that stated that they should allow smaller LECs to choose whether or not to deregulate their payphones.²⁵ Moreover, the FCC directed the Common Carrier Bureau of the FCC the authority to determine the least burdensome method for small carriers to comply with the requirements for filing of tariffs with the Commission.²⁶ The FCC stated:

[T]he tariff filing requirement is not unduly burdensome on small entities in that LECs are now required to file their payphone service tariffs with the states in the same manner as they have been filing tariffs for other telephone services with the states. Additionally, to provide maximum flexibility and the least burdensome approach, the Order on Reconsideration delegates to the Common Carrier Bureau the authority to determine the least burdensome method for small carriers to comply with the requirements for filing of tariffs with the Commission, such as those suggested by the NTCA.

C. The Small Companies Failed to Object in the Original Docket (Docket -Number 97-00409) Concerning the Applicability of Section 276 to the Small Companies and Are Barred from Raising the Issue in This Proceeding

In the original docket, docket 97-00409, the small companies never raised the issue

²⁴ See Report and Order, 11 FCC Rcd 20,541 (1996), ¶76.

²⁵ See Report and Order, 11 FCC Rcd 20,541 (1996), ¶353.

²⁶ See Report and Order, 11 FCC Rcd 20,541 (1996), ¶353.

concerning the applicability of Section 276 to the small telephone companies. Therefore, their argument cannot be sustained at this juncture because (1) they failed to raise the issue in the original docket, (2) never objected at the start of this docket and (3) they filed tariffs in this matter with the TRA. The companies are barred from raising the issue at this juncture since they failed to address this matter in the prior docket and they have no valid basis to raise the issue at this point in this proceeding.

Lastly, the TRA has already stated in Docket 97-00409 that Section 276 applies to small companies. In the TRA's Interim Order in Docket 97-00409 they stated that the rates adopted by the TRA were to be applied to all providers of payphone service.²⁷

D. Section 276 of the Telecommunications Act of 1996 Requires that the Rules Promulgated by the FCC Concerning Payphones Are Nondiscriminatory

Section 276 states that the FCC issue rules that are nondiscriminatory in order to advance the procompetitive goals and policies of the Act. If the FCC only required that Section 276 be applied to RBOC's, the rules would be contrary to the goals and intent of Section 276. Section 276 also prohibits payphone rates from including subsidies to or from other telecommunications services and prohibits the creation of preferences to a LEC's payphone operation.²⁸ The overall intent of Section 276 is to advance competition in the payphone industry and therefore, it applies to all telephone companies with payphones.

²⁷ See *In Re: All Telephone Companies Tariff Filings Regarding Reclassification of Pay Telephone Service as Required by Federal Communications Commission (FCC) Docket 96-128*, Interim Order, TRA Docket No. 97-00409, p. 24 (February 1, 2001).

²⁸ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC Docket No. 96-388, 11 FCC Rcd 20,541, ¶2 (Sept. 20, 1996) ("Report and Order").

In addition, state law requires that telephone services provided in the state are nondiscriminatory. Tenn. Code Ann. § 65-5-201 states that nondiscriminatory or preferential rates are not permitted and Tenn. Code Ann. § 65-4-124(a) states that all telecommunications services shall provide non-discriminatory interconnection to their public networks. Also, the general telecommunications services policy set forth by the General Assembly declares that the goal of Tennessee “is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, . . .”

E. Application of *In the Matter of Wisconsin Public Service Commission Order Directing Filings By Small Telephone Companies to This Proceeding* is Erroneous

The argument by the small telephone companies that they are not subject to Section 276 based upon an order issued by the FCC’s Common Carrier Bureau under the title *In the Matter of Wisconsin Public Service Commission Order Directing Filings* (“Wisconsin Order”) is incorrect. The Wisconsin Order directed the four largest carriers in Wisconsin to submit copies of their tariffs to the FCC (emphasis added).²⁹ Further, the Wisconsin Order was issued by the Deputy Chief of the Common Carrier Bureau of the FCC. The proceeding was not the result of a docket or matter brought before the FCC Commissioners and the FCC had not issued an Order providing an exemption for all other telephone carriers in every single state.

The Wisconsin Order was a result of a proceeding filed by the Wisconsin regulatory agency seeking the assistance of the FCC since their state law conflicted with the rules issued by

²⁹ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Order (March 2, 2000), ¶1 (“Wisconsin Order”).

the FCC. In that Order, it stated that the state commission was to ensure that the rates, terms and conditions applicable to the provisions of basic payphone lines comply with the requirements of Section 276.³⁰ However, when a state commission is unable to review the tariffs, it may be necessary for the LEC's to file the tariffs with the FCC because the FCC has ultimate jurisdiction to further the mandates of Section 276.³¹ The Wisconsin Commission decided that they lacked authority to review the payphone service offerings and it invoked the FCC's obligations under Section 276 to review the matter in Wisconsin and requested that the FCC review the matter and issue an Order related to that particular case.³²

The FCC Order did not state that all independent small carriers were exempt from Section 276. There was no mention in the Wisconsin Order stating that all small telephone companies with payphones did not have to meet the requirements of Section 276. Also, there is no mention that the Order was to be applied to all other states. The language used in the Wisconsin Order categorically states that "[w]e therefore direct the four largest LECs in Wisconsin to submit currently effective intrastate tariffs that set forth the rates, terms, and conditions associated with payphone services to the Commission along with supporting documentation in compliance with the requirements of section 276 . . ."³³ The Common Carrier Bureau was explicit that the Order

³⁰ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Order (March 2, 2000), ¶2 ("Wisconsin Order").

³¹ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Order (March 2, 2000), ¶2 ("Wisconsin Order").

³² See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Order (March 2, 2000), ¶5 ("Wisconsin Order").

³³ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Order (March 2, 2000), ¶5 ("Wisconsin Order").

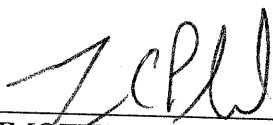
was applicable to the Wisconsin LECs only. The Order states "this Order only applies to the LECs in Wisconsin specifically identified herein."³⁴ Moreover, the facts of this case can be distinguished from the Wisconsin case. The Wisconsin Order applied to Wisconsin telephone companies and was not a precedent or directive for any other state to follow.

This last point is emphasized repeatedly in the memorandum and order from the appeal of the Wisconsin Order to the FCC.³⁵ The FCC makes it clear in ¶¶ 31, 34, 42, 44 and 67 of the Order that the state commissions have the authority to apply the "new services test" to all LECs. If fact, in these same provisions of the Order the FCC makes it clear that it encourages the states to do so and commends the states that have already taken this approach.

CONCLUSION

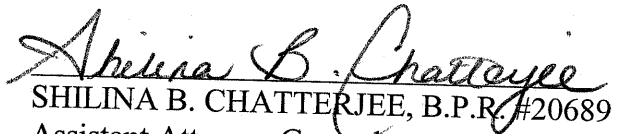
For the foregoing reasons, the Attorney General of the State of Tennessee respectfully requests that TRA apply Section 276 of the Telecommunications Act of 1996 to all telephone companies in the State of Tennessee including the small telephone companies.

Respectfully submitted,


TIMOTHY C. PHILLIPS, B.P.R. #12751
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³⁴ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, CCB/CPD No. 00-01, DA 00-347, Order (March 2, 2000), ¶13 ("Wisconsin Order").

³⁵ See *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, 17 FCC Rcd. 2051 (January 31, 2002).


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Dated: December 27, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail, facsimile or hand delivery on December 27, 2002.

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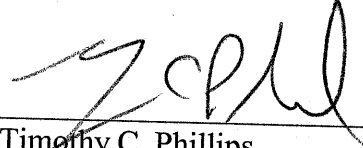
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